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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1981

NO. 81 6131

WILBERT LEE EVANS

Petitioner

vs.

COMMONWEALTH OF VIRGINIA

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE

SUPREME COURT OF VIRGINIA

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QUESTIONS PRESENTED

I. Whether Title 19.2 Sections 264.2 and 264.4 (C) of the Code of Virginia, 1950, as amended, are so broad and vague in their application to the present case as to be violative of the Eighth and Fourteenth Amendments of the United States Constitution.

II. Does the application of Section 19.2-264.4 of the Code of Virginia impermissably reduce the burden of proof on the government as applied to the sentencing tests provided in the statute.

III. Was the admission of evidence of alleged crimes and pending charges on the theory that they showed the defendant's "state of mind" violative of the denfendant's guaranty of due process under the Fifth and Fourteenth Amendments of the United States Constitution.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

NO._____

WILBERT LEE EVANS

Petitioner

vs.

COMMONWEALTH OF VIRGINIA

Respondent

PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF VIRGINIA

Petitioner, Wilbert Lee Evans, prays that a writ of certiorari issue to review the judgment of the Supreme Court of Virginia entered in this case.

CITATION TO OPINION BELOW

The opinion of the Supreme Court of Virginia is reported in Evans v. Commonwealth, __Va. ___, 284 S. E. 2d 816 (1981), and is appended hereto as Appendix A.

JURISDICTION

The judgment of the Supreme Court of Virginia was entered on December 4, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1257 (3), petitioner having

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asserted below and intending to here assert deprivation of rights secured by the Constitution of the United States.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. This case involves the Fifth Amendment to the United States Constitution, which provides in part:

> No person shall...be deprived of life liberty or poverty, without due process of law.

and the Fourteenth Amendment to the United States Constitution which provides in pertinent part:

> No state shall...deprive any person of life, liberty or property, without the due process of law.

and the Eighth Amendment of the United States Constitution, which states:

> ...no (v) cruel and unusual punishment (shall be) inflicted.

2. This case also involves Virginia Code Section 19.2-264.2, which provides in part:

> A sentence of death shall not be imposed unless the ... jury shall (1) after consideration of the past criminal record of the convictions of the defendant (emphasis added) find that there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing serious threat to society...

and Section 19.2-264.2 (1) which provides in pertinent part:

> The death penalty shall not be imposed unless the Commonwealth shall prove that there is a probability based on the prior history of the defendant...that he would commit acts of violence which would constitute a continuing serious threat to society...

3. Section 18.2-31 of the 1950 Code of Virginia, as amended, attached hereto as Appendix B, defining capital murder and fixing the punishment therefore as death.

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4. Sections 19.2-264.2 to 19.2-264.5 of the 1950 Code of Virginia, as amended, attached hereto as Appendix C, defining the terms and conditions of trials of capital cases.

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STATEMENT OF THE CASE

Petitioner seeks a writ of certiorari from this Court to the Supreme Court of Virginia to review a decision of that Court upholding his conviction and sentence of death.

Petitioner, was arrested, indicted and convicted of the charges of capital murder, to-wit: premeditated killing of a law enforcement officer for the purpose of interfering with the performance of the officer's offical duties and the use of a fire-arm during the commission of a felony. The jury reccmmended a sentence of death for the crime of capital murder solely upon the finding "after consideration of his prior history that there is a probability that he would commit criminal acts of violence that would constitute a continuing serious threat to society." (Title 19.2, Section 264.4 (C), Code of Virginia, 1950, as amended.)

The offenses occurred on January 27, 1981, when the defendant, a prisoner transported from North Carolina to Alexandria, Virginia, for testimony in a habeas corpus proceeding, attempted to escape from the custody of a deputy sheriff. In effectuating his attempted escape from the deputy sheriff, the petitioner struggled with the deputy sheriff, gained control of his weapon, and in attempting to shoot handcuffs off of his hand, struck the deputy sheriff with the bullet, killing him. The petitioner admitted that he was the one in custody, and as a result of his attempt to escape he caused the deputy sheriff's death with the firearm. The petitioner consistently maintained, however, and so testified in his own defense, that he did not intend to kill the deputy sheriff and that the fatal shooting occurred accidently while he was attempting to escape. At trial, the prosecution presented evidence, as to why the petitioner was in Alexandria, Virginia. Additionally , the prosecution offered testimony of two inmates at the Alexandria jail which was disputed

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by the petitioner, that there were charges pending against the petitioner in North Carolina for murder and robbery. The petitioner objected to this testimony on the grounds that the prejudicial effect of the same far outweighed the evidentiary value. Tr. 297-300, 304-306, and 355, 356.

The jury returned verdicts of guilty as to both counts. Following the verdicts, a hearing was held regarding sentencing. The testimony offered by the prosecution consisted of a selection of the defendant's criminal record (Commonwealth's exhibits #19, #20, and #21) and the testimony of Alexandria police officer who testified that he had a conversation with the petitioner after the shooting of the deputy to the effect that he was concerned about returning to North Carolina on other charges. Tr. 586. This testimony was objected to by counsel for the petitioner on the same ground as the previous objection had been tendered, i.e. that the prejudicial effect far outweighted the evidentiary effect. The objection was overruled, the testimony was allowed to stand. The same police officer admitted in his testimony that a lengthly statement had been given by the petitioner in writing to him prior to the statement referred to above and that during the written statement nothing was said about concern of pending charges in the State of North Carolina or killing or harming others. (Tr. pp 588-590). The jury was instructed in writing that it could impose the death penalty if it found one of two statutory aggravating circumstances under Title 19.2, Section 264.4 (C).

The jury returned a sentence of death on the capital murder counts submitted to them on the basis of the existence of circumstances indicating "that, after consideration of his prior criminal record, there is a probability that he would commit criminal acts of violence that would constitute a continuing

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serious threat to society...."

On appeal, the Supreme Court of Virginia affirmed the conviction on both counts and affirmed the sentences on both counts. The Court, pursuant to Title 17, Section 110.1, Code of Virginia, 1950, as amended, reviewed the death sentence and determined that the petitioner ".....had a proclivity for violence that made him a menace to society....." and affirmed the death sentence and refused to set the same aside or to reduce the same to life.

HOW THE FEDERAL QUESTIONS WERE RAISED AND DECIDED BELOW

The questions raised in this petition were raised, although perhaps not expressly raised in the petitioner's trial, and on his brief on direct appeal to the Supreme Court of Virginia. They were overruled by both the trial Court and by the Supreme Court of Virginia. All were sufficiently raised and considered in the Supreme Court of Virginiato sustain this Court's jurisdiction.

At trial, and before the Supreme Court of Virginia, the Defendant challenged the constitutionality on the statute (19.2-264. 2 et seq.) as facially unconstitutional, as being vague and overbroad. The statute was also challenged because it gave the jury improper and excessive authority in imposing sentence, and left them with no standards by which to base their sentence. Both the trial Court and the Supreme Court of Virginia affirmed the Constitutionality of the statute on all grounds.

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REASONS FOR GRANTING THE WRIT

I. WHETHER TITLE 19.2, SECTION 264.2 AND 264.4 (C) OF THE CODE OF VIRGINIA, 1950, AS AMENDED, ARE SO BROAD AND VAGUE IN THEIR APPLICATION TO THE PRESENT CASE AS TO BE VIOLATIVE OF THE EIGHTH AND FOURTEENTH AMENDMENTS OF THE CONSTITUTION.

Since the Supreme Court decided the case of Furman vs. Georgia 408 U.S. 238 (1972) various States have attempted to enact legislation instituting the death penalty in different forms. Georgia enacted one form of statute involving a balancing between aggravating factors and mitigating factors before the death penalty could be imposed. This type of statute was upheld by the Court in Gregg vs. Georgia 428 U S 153. The other type of capital punishment statute that was enacted in the aftermath of Furman was enacted in Texas, and was largely upheld by the Court in Jurek vs. Texas 428 US 262. It is this latter type which has been enacted in Virginia, and which is the subject of this question.

The Texas statute (Section 19.02 [a] provides for a bifurcated trial, the first part of which determines guilt or innocence, and the second part, (assuming the jury, or the Court, sitting without a jury, finds the defendant guilty of a crime, the penalty for which is death) assesses the sentence. The Texas statute (Art 37.071) when Jurek was decided requires the jury to answer three questions in the affirmative, and requires a finding beyond a reasonable doubt for the following:

1. Whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result;

2. Whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society; and

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3. If raised by the evidence, whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the defendant.

The Virginia statutory structure contained in Section 19.2-264.4 (C) calls for the jury to find based on the defendant's past record of convictions, there is a probabilty that the defendant will continue to be a danger to society in that he will continue to commit violent acts. There is no other requirement. No additional finding is required. The jury is given no points of reference upon which it may base its finding. Courts are daily called upon to make similar decisions, but have considerable prior experience upon which to base their findings. The Court needs no reference points - its experience is adequate. The State of Georgia struck down a similar provision of its sentencing scheme in Arnold vs. State 224 SE2d 386. The Court in that case found that the death penalty was unconstitutional insofar as it allowed for the death penalty where a murder is committed by a person who has a "substantial history of serious assaultive criminal convictions."

The Supreme Court, in the Jurek case (supra), found that the scheme set forth in the Texas statute was not lacking in guidance, and passed the arbitrariness found in Furman. The difference between the Texas statute and the one in Virginia is that in Virginia, there are no additional findings required. The jury need only find that there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing to society. Nothing more is required. Without further definition and guidance, or some other points of reference for the jury, the section must fail the Constitution test as vague (see Grayned vs. City of Rockford, 33 LEd2d 228 (1971). The statute in Virginia leaves too much latitude to the jury.

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II. DOES THE APPLICATION OF SECTION 19.2-264.4 OF THE CODE OF VIRGINIA IMPERMISSABLY REDUCE THE BURDEN OF PROOF ON THE GOVERNMENT AS APPLIED TO THE SENTENCING TESTS PROVIDED IN THE STATUTE.

Section 19.2-264.4 of the Code of Virginia, provides in pertinent part that the death penalty may not be imposed on the defendant,

> "...unless the Commonwealth shall proved beyond a reasonable doubt based upon evidence of the prior history of the defendant...that he would commit criminal acts of violence that would constitute a continuing serious threat to society"

It goes without argument of citation that the burden of proof in a criminal case is proof beyond a reasonable doubt. It also goes without citation that this burden is as to each and every element involved in the trial. The statutory sentencing structure as it is set forth calls for the Commonwealth to prove beyond a reasonable doubt that something is probable.

Probable is defined as that which is likely to occur, Random House College Dictionary, 1973, p. 155. Black's Law Dictionary (4th ed, 1951) defines "probable" as "having more evidence for than against; supported by evidence which inclines the mind to believe but leaves some room for doubt" (p. 1427, citing Barrett vs. Green River & Rock Springs Live Stock Co., 205 P 742, 743) In simplest terms, the definition effectively means that the Commonwealth must prove certain facts by a preponderance of the evidence. Clearly,that is less than the law requires of the prosecution in a criminal case.

III. WAS THE ADMISSION OF EVIDENCE OF ALLEGED CRIMES AND PENDING CHARGES ON THE THEORY THAT THEY SHOWED THE DEFENDANT'S STATE OF MIND VIOLATIVE OF THE DEFENDANT'S GUARANTY OF DUE PROCESS UNDER THE FIFTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION.

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During the guilt phase of the trial, two witnesses were permitted to testify, over objection that the defendant had other charges of offenses pending against him, none of which had been reduced to conviction. In the penalty phase of the trial, a witness was likewise permitted to testify, over objection, regarding other pending charges. The testimony was proffered by the prosecution to show the defendant's "state of mind".

The rule regarding admissiblity of evidence regarding other crimes or offenses is well settled. As a general rule, evidence of other offenses is not admissable in a criminal trial (22A CJS 729; Criminal Law Section 682). The exceptions to this rule are likewise well settled. Such evidence is admissable to show a number of things, among which is intent, or motive. (Michaelson vs. US, 69 S Ct. 213; 335 US 469; 93 L Ed 168; 22A CJS 764, 775).

The evidence offered by the witnesses referred to above, or pending charges was admitted for no other reason than to inflame the jury with evidence that was not admissable in the penalty phase of the trial because it was not a "prior record of conviction" as required by the Virginia statute (Section 19.2-264.2 & 264.4). The trial court cautioned the jury as to the purposes for which the testimony was admitted.

The issue raised is first whether such evidence was necessary to admit at all, which requires that it be probative of a fact that can not be proved any other way; and, even it is probative of a fact, whether the prejudice is admitting it outweights its probative value.

As stated, the evidence was offered to show the Defendant's "state of mind". The prosecution arguing that it showed the defendant's intent. There was never any cognizable objection that the defendant had been transferred

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to Virginia from custody in North Carolina, and that the defendant undoubtedly came to Virginia to escape-there was ample evidence to support that. The reason he was in jail had nothing to do with his state of mind as it had to do with his killing the police officer. The fact that the defendant was facing life imprisonment in North Carolina or that he would "kill or be killed " in his attempt to escape. The evidence was not probative of any fact that was not already plainly before the jury, it only tended to show the jury that the defendant had committed other acts of violence which were not otherwise admissible.

The Court properly cautioned the jury regarding the uses to which such evidence could be placed, but by the time the penalty phase of the trial began, the damage was already done, and no amount of caution could undo the damage already done.

As a result of this testimony the defendant was forced to defend against activities about which he was unable to obtain any information about, and of which he was presumed innocent, in violation of his guaranty of due process under the Fifth and Fourteenth Amendments of the United States Constitution.

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CONCLUSION

For the foregoing reasons, petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of Virginia in Evans v. Commonwealth, __Va.__, 284 S.E. 2d 816 (1981).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have this 27th day of January, 1982, mailed first class, postage prepaid, three copies of the foregoing Petition to Jerry P. Slonaker, Esquire, Assistant Attorney General, Criminal Division, 830 East Main Street, 900 Fidelity Building, Richmond, Virginia 23219, Counsel for Respondent.

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VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Friday *the* 4th *day of* December, 1981.

Wilbert Lee Evans, Appellant,

against Record No. 811056

Commonwealth of Virginia, Appellee.

Upon an appeal from a judgment rendered by the Circuit Court of the City of Alexandria on the 1st day of June, 1981.

For reasons stated in writing and filed with the record, the court is of opinion that there is no error in the judgment appealed from. Accordingly, the judgment is affirmed.

It is ordered that the said circuit court allow counsel for the appellant a fee of $550 for services rendered the appellant on this appeal, in addition to counsel's costs and necessary direct out-of-pocket expenses.

This order shall be forthwith certified to the said circuit court.

A Copy,

Teste:

Allen L. Lucy

Clerk

APPENDIX a

Present: All the Justices

WILBERT LEE EVANS

-v- Record No. 811056

COMMONWEALTH OF VIRGINIA

OPINION BY JUSTICE GEORGE M. COCHRAN

December 4, 1981

FROM THE CIRCUIT COURT OF THE CITY OF ALEXANDRIA
Wiley R. Wright, Jr., Judge

A jury found Wilbert Lee Evans guilty of capital murder as defined by Code § 18.2-31(f), in the willful, deliberate, and premeditated killing of a law-enforcement officer for the purpose of interfering with the performance of the officer's official duties.[1] In the second stage of the bifurcated proceeding conducted pursuant to the provisions of Code §§ 19.2-264.3 and -264.4, the same jury fixed Evans's punishment at death. After considering the probation officer's report required by Code § 19.2-264.5, the trial court imposed the death sentence recommended by the jury. We have consolidated our automatic review of this sentence with Evans's appeal from his conviction, as authorized by Code §§ 17-110.1(A) and -110.1(F), and we have given them priority on our docket in compliance with Code § 17-110.2. Evans asks us to reverse his conviction and remand the case for a new trial, or in the alternative to commute his death sentence to imprisonment for life.

---

[1] The jury also found Evans guilty of using a firearm in the commission of a felony and fixed his punishment at confinement in the penitentiary for one year. The trial court entered judgment on that verdict, the judgment was not appealed, and the conviction is not pertinent to the present appeal.

I. Constitutionality of the Capital Murder Statutes.

Evans contends that Code § 19.2-264.4C[2] is unconstitutionally vague and overbroad in violation of his rights under the Eighth and Fourteenth Amendments to the United States Constitution. He relies entirely, however, upon arguments that, as he concedes, we have recently rejected in James Dyral Briley v. Commonwealth, 221 Va. 563, 577-80, 273 S.E.2d 57, 65-67 (1980). We reaffirm our views expressed in that case. See also Martin v. Commonwealth, 221 Va. 436, 439-40, 271 S.E.2d 123, 125-26 (1980).

Evans also argues that Code § 19.2-264.2[3] is facially unconstitutional. He adopts the arguments that, as he further

---

[2] § 19.2-264.4C provides as follows:

> The penalty of death shall not be imposed unless the Commonwealth shall prove beyond a reasonable doubt that there is a probability based upon evidence of the prior history of the defendant or of the circumstances surrounding the commission of the offense of which he is accused that he would commit criminal acts of violence that would constitute a continuing serious threat to society, or that his conduct in committing the offense was outrageously or wantonly vile, horrible or inhuman, in that it involved torture, depravity of mind or aggravated battery to the victim.

[3] § 19.2-264.2. Conditions for imposition of death sentence. — In assessing the penalty of any person convicted of an offense for which the death penalty may be imposed, a sentence of death shall not be imposed unless the court or jury shall (1) after consideration of the past criminal record of convictions of the defendant, find that there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing serious threat to society or that his conduct in committing the offense for which he stands charged was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind or an aggravated battery to the victim and (2) recommend that the penalty of death be imposed.

concedes, we rejected in Smith v. Commonwealth, 219 Va. 455, 248 S.E.2d 135 (1978), cert. denied, 444 U.S. 967 (1979), and Waye v. Commonwealth, 219 Va. 683, 251 S.E.2d 202 (1978), cert. denied, 442 U.S. 924 (1979). See Stamper v. Commonwealth, 220 Va. 260, 267, 257 S.E.2d 808, 814 (1979), cert. denied, 445 U.S. 972 (1980). We reaffirm our views expressed in those cases.

II. The guilt trial.

The Commonwealth presented evidence that Evans, a prisoner, fatally shot Deputy Sheriff William Truesdale on January 27, 1981, while the officer was conducting him to jail in Alexandria. Evans admitted that he caused Truesdale's death with a firearm while the officer was engaged in the performance of his official duties. Evans consistently maintained, however, and so testified in his own defense, that he did not intend to kill Truesdale, and that the fatal shooting occurred accidentally while Evans was attempting to escape from police custody. Thus, the crucial question throughout the guilt trial was Evans's intent.

The uncontradicted evidence shows that Evans was in custody in North Carolina, that he volunteered to testify for the Commonwealth in a habeas corpus proceeding to be held in Alexandria, and that he was transported from North Carolina to Alexandria for that purpose. Noel I. Butler, Assistant Commonwealth's Attorney, who interviewed Evans in the Alexandria jail on January 26, 1981, found him cooperative, willing to testify, and able to provide testimony of value on behalf of the Commonwealth. On the following day, however, when Evans was brought into the courtroom to testify, he refused to do so, denied any knowledge of the case, and by his behavior caused the court to recess the proceeding.

Deputy Truesdale removed Evans and two other prisoners, Yvette Boone and Anthony Jasper, from the courthouse to jail in a van. Upon arriving outside the jail, the prisoners proceeded in single file up the steps leading to the jail door, Boone in front, followed by Jasper and then Evans. Jasper's right hand was handcuffed to Evans's left. As Jasper entered the door, Evans began to grapple with Truesdale on the steps. Evans, gaining possession of Truesdale's revolver, shot the officer in the chest from a distance of not more than one-half inch, pointed the weapon at Jasper but did not fire, freed himself by shooting open the handcuffs, and fled on foot. Running through a nearby law office, Evans threatened a secretary with the revolver before continuing his flight. Surrounded by pursuing officers in a nearby parking lot, Evans shot himself, inflicting a superficial wound, and was retaken into custody.

Several inmates of the Alexandria jail were called as witnesses for the Commonwealth to testify to certain inculpatory statements made by Evans. Before these witnesses testified, Evans objected to any reference they might make to charges pending against him in North Carolina on which he had not been convicted. The court overruled the objection on the ground that such evidence would be admissible to show Evans's intent or state of mind.

Ralph Washington, an inmate, testified that Evans told him the night before the shooting that he was in Alexandria to testify in a case but that he was not going to say anything, that what he wanted was to "get the hell out." Evans asked Washington about jail security, what court was like, whether the guards carried guns, and whether he could wear civilian clothes to court. He asked another inmate about a good place to run if he escaped. Washington testified that Evans stayed up all night and "was like he was getting ready to go to war." Washington's

testimony continued as follows:

> "A. He said he'd already come down; he was already facing life and he ain't got nothing to lose. He said he was going to try any means possible to escape.
>
> "Q. To what steps would he go?
>
> "A. Anybody that gets in his way to stop him, he would take him out.
>
> "Q. Take him out? What does that mean?
>
> "A. I guess kill them."

At this time the court cautioned the jury as follows:

> "Members of the jury, the statements of the defendant are being admitted into evidence not to show his legal situation in the State of North Carolina, but rather to show his state of mind or intention at the time he made the statements. You should consider those statements only in that respect."

Yvette Boone testified that she was brought from jail in North Carolina to the Alexandria jail to testify as a witness in the same case in which Evans was expected to testify. While they were still in jail in North Carolina, Evans attempted to coach her in preparation for her appearance in court. He also informed Boone that when he went to court he was going "to run." In Alexandria, before Boone testified at the hearing, Evans told her that he had come not to testify but to escape. She, Jasper, and Evans were the prisoners being taken back to jail when Deputy Truesdale was shot. She saw Truesdale and Evans "tussling on the steps," but she was inside the jail door when she heard the shots fired.

Anthony Jasper testified that he occupied the same cell with Evans the night before the shooting, and Evans said that he had come to Alexandria "to try to escape." He asked Jasper the way to run to get to Washington, D. C. "He said he ain't got nothing to lose, you know .... He had two life sentences, something like that." The trial court promptly cautioned the jury that these statements were admitted only to show Evans's

state of mind when he made the statements and not to prove whether he was facing punshment in North Carolina.

Jasper also testified that he and Evans were handcuffed together on the trip back to jail from the courthouse. Evans asked him whether Truesdale carried a weapon. Jasper had climbed the steps and was entering the jail door when Evans "yanked" him back. He saw Evans and Truesdale struggling over the handgun in Evans's hand. Evans had the gun in the air when Truesdale put his hand on it. Evans said, "Let me go or I'll kill your ass." Then the revolver "came down toward his side and he pulled the trigger." Evans then put the gun to Jasper's head, Jasper protested, and Evans shot the handcuffs off and fled.

Evans, testifying in his own defense, insisted that he had no intent to escape until he saw that Deputy Truesdale was off balance on the jail steps and decided to "run past him." He seized Truesdale's gun to "shoot the handcuffs off." He denied any intention of shooting the officer but asserted that he shot him accidentally while firing at the handcuffs.

Evans concedes that evidence was admissible to show that he planned in North Carolina to escape in Virginia and that, if necessary, he would kill anyone who stood in his way. He argues, however, that the trial court erred in admitting evidence that he was awaiting trial in North Carolina on charges for which he faced one or more life sentences. He relies upon the general rule recently restated in Moore v. Commonwealth, 222 Va. 72, 76, 278 S.E.2d 822, 824 (1981), that evidence of other offenses is inadmissible to prove guilt of the crime for which the accused is on trial. But this general rule, as we have frequently stated, is subject to numerous exceptions. Thus, evidence of other offenses is admissible to show motive or intent or to negate the possibility of accident. Id. at 76, 278 S.E.2d at 824-25. See Brooks v. Commonwealth, 220 Va. 405, 407,

258 S.E.2d 504, 506 (1979); Kirkpatrick v. Commonwealth, 211 Va. 269, 272, 176 S.E.2d 802, 805 (1970); Williams v. Commonwealth, 128 Va. 698, 711-12, 104 S.E. 853, 860-61 (1920).

Here, the trial court exercised commendable caution in twice instructing the jury during the guilt trial that the statements made by Evans in reference to charges pending against him in North Carolina were admitted into evidence solely for the purpose of showing his intent or state of mind. We hold that the statements were properly admitted for that purpose. The jury could reasonably infer that a prisoner held on charges for which he might be sentenced, upon conviction, to imprisonment for life would have a far more compelling motive for attempting to escape by force and violence than one held on charges for which he could receive only a lesser punishment.

We conclude that the trial court committed no error in its conduct of the guilt trial.

III. The Sentence Proceeding.

At the sentence proceeding which immediately followed the determination of guilt, the Commonwealth presented the testimony of one witness, Officer Louis Pough, of the Alexandria Police Department. Pough testified that he had a conversation with Evans after the Truesdale shooting, and Evans was "concerned about returning to North Carolina on other charges." Evans told Pough that "it mattered not to him who was in his way," that he was from the District of Columbia and he "would try to escape again or be killed at home." Counsel for Evans objected to Pough's testimony about North Carolina charges and moved for a mistrial. The court overruled the motion but cautioned the jury to disregard the reference to "other charges" pending in North Carolina.

The other evidence presented at this proceeding consisted of Commonwealth Exhibits 19, 20, and 21, showing several of Evans's convictions in North Carolina and the sentences imposed thereon as follows:

February 21, 1964	- Breaking, entering and larceny	- 6 months
July 30, 1964	- Assaulting a police officer with a knife while the officer was in the performance of his duties	- 6 months on road
July 30, 1964	- Engaging in an affray with a knife	- 6 months on road to run consecutively with other sentence of same date
September 30, 1964	- Engaging in an affray with a deadly weapon	- 4 months
December 15, 1970	- Assault & Battery & Assault Inflicting Serious Damage (hitting man in face with his fist, breaking his nose and knocking one tooth out)	- 60 days
July 12, 1972	- Escape from North Carolina Prison System	- 3 months
September 27, 1972	- Assault with a deadly weapon inflicting serious injuries	- not less than four years nor more than five years

Included in the jury instructions, all of which were unchallenged on appeal, was Instruction No. 14[4] stating in the alternative what the Commonwealth had to prove before the jury could fix Evans's punishment at death. After retiring to consider its verdict, the jury propounded two questions to the court, first, whether Evans's "past criminal record," to which Instruction No. 14 referred, included all the evidence "offered before and after the verdict," and second, whether Officer Pough's testimony could be considered as part of Evans's record. The court answered both questions in the negative and further instructed the jury that the only evidence of Evans's past

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4 "INSTRUCTION NO. 14

"THE COURT INSTRUCTS THE JURY THAT:

"You have convicted the defendant of an offense which may be punished by death. You must decide whether the defendant shall be sentenced to death or to life imprisonment. Before the penalty can be fixed at death, the Commonwealth must prove beyond a reasonable doubt at least one of the following two alternatives:

"(1) That, after consideration of his past criminal record there is a probability that he would commit criminal acts of violence that would constitute a continuing serious threat to society; or

"(2) That his conduct in committing the offense was outrageously or wantonly vile, horrible or inhuman, in that it involved torture, depravity of mind or aggravated battery to the victim beyond the minimum necessary to accomplish the act of murder.

"If you find from the evidence that the Commonwealth has proven beyond a reasonable doubt either of the two alternatives, then you may fix the punishment of the defendant at death.

"If the Commonwealth has failed to prove either alternative beyond a reasonable doubt, then you shall fix the punishment of the defendant at life imprisonment." (Emphasis added).

criminal record which it could consider was contained in Exhibits 19, 20, and 21. Subsequently, the jury returned its verdict finding "after consideration of his prior history that there is a probability that he would commit criminal acts of violence that would constitute a continuing serious threat to society," and fixing Evans's punishment at death.

Evans contends that the trial court erred in overruling his motion for a mistrial made when Officer Pough referred to other charges pending against Evans in North Carolina. There is no merit in this contention. The jury was aware that Evans faced charges in North Carolina because of references thereto properly admitted in the guilt trial to show his motive or intent. The trial court, however, expressly directed the jury to disregard the reference to North Carolina charges in considering the appropriate punishment to be imposed upon Evans. The court further instructed the jury, in answer to its questions, that Evans's past criminal record was limited to convictions shown in Exhibits 19, 20, and 21 and did not include anything revealed by Officer Pough's testimony.

We perceive no prejudice to Evans resulting from Pough's testimony, but if there was any prejudice, it was eliminated by the trial court's decisive corrective action. See Stamper v. Commonwealth, supra, 220 Va. at 277, 257 S.E.2d at 820, Lewis v. Commonwealth, 211 Va. 80, 83, 175 S.E.2d 236, 238 (1970). We hold, therefore, that the trial court did not err in overruling Evans's motion for a mistrial.

Code § 19.2-264.5[5] authorized the trial court, after considering the report of the probation officer, "and upon good cause shown," to commute the death sentence of Evans to imprisonment for life. The report, however, was damaging rather than helpful to Evans. It showed that he had a criminal record more extensive than that introduced into evidence in Exhibits 19, 20, and 21, an unsatisfactory prison record, and an employment history which included acts of violence.

In 1968, a District of Columbia court sentenced Evans to serve a total of 720 days for assault and petit larceny. During his incarceration he received four disciplinary reports, including one for fighting. One former employer in the District of Columbia reported that in 1979 he refused to rehire Evans after Evans had "choked" a waitress during an argument. Several other former employers gave unfavorable reports about his work habits and behavior, but two reported that he was a good worker. His prison records in North Carolina revealed that seven disciplinary reports, one for unauthorized possession of a weapon, were filed against him from February 10, 1973, through September 28, 1975. Other convictions in North Carolina not listed in Exhibits 19, 20, and 21 included one in 1962 for assault with a

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[5] § 19.2-264.5. Post sentence reports.—

When the punishment of any person has been fixed at death, the court shall, before imposing sentence, direct a probation officer of the court to thoroughly investigate upon the history of the defendant and any and all other relevant facts, to the end that the court may be fully advised as to whether the sentence of death is appropriate and just. Reports shall be made, presented and filed as provided in § 19.2-299. After consideration of the report, and upon good cause shown, the court may set aside the sentence of death and impose a sentence of imprisonment for life.

deadly weapon, with a six months sentence suspended, one in 1965 for assault and battery, disorderly conduct, resisting arrest, and breaking arrest, with a six months sentence, and one in 1967 for assault and battery, with a thirty days sentence.

By order entered June 1, 1981, the trial court sentenced Evans to death in accordance with a jury verdict. Thereafter, Evans filed a motion to set aside the verdict of the jury and grant him a new trial. The trial court overruled the motion. As to the guilt trial, Evans based his motion upon the admission into evidence of the testimony of Washington and Jasper relating his statements about charges pending against him in North Carolina. Having held that this testimony was admissible, we hold that the trial court properly overruled Evans's motion insofar as it was based upon this ground. As to the sentence proceeding, Evans based his motion upon the alleged prejudicial effect of Officer Pough's testimony that Evans referred to the pending North Carolina charges. Having held that the trial court did not err in overruling Evans's motion for a mistrial based upon the same ground, we hold that the court did not abuse its discretion in overruling the post-trial motion insofar as it was based upon this ground.

We conclude that the trial court committed no error in its conduct of the sentence proceeding.

IV. Appellate Review of the Death Sentence.

Under the mandate of Code § 17-110.1[6] we review the death sentence imposed upon Evans in the trial court. Evans contends that the sentence should not be affirmed because the evidence is insufficient to show either of the statutory prerequisites to its imposition. He argues that his past criminal record, as presented to the jury, fails to establish that there is a probability that he will commit criminal acts of violence that would constitute a continuing threat to society, and that there is no evidence that his killing of Truesdale was outrageously or wantonly vile, horrible, or inhuman. Therefore, he says, the death sentence is excessive and disproportionate to the penalty imposed in similar cases, and the jury must have been influenced by passion, prejudice, or other arbitrary factors.

The jury based its verdict in the sentence proceeding exclusively upon its finding that Evans had a proclivity for violence that made him a menace to society. Accordingly, we will assume, as the jury indicated by its verdict, that Evans's

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[6] Code § 17-110.1 provides in pertinent part:

> C. In addition to consideration of any errors in the trial enumerated by appeal, the court shall consider and determine:
>
> 1. Whether the sentence of death was imposed under the influence of passion, prejudice or any other arbitrary factor; and
>
> 2. Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.
>
> D. In addition to the review and correction of errors in the trial of the case, with respect to review of the sentence of death, the court may:
>
> 1. Affirm the sentence of death; or
>
> 2. Commute the sentence of death to imprisonment for life.

conduct in killing Truesdale was not outrageously or wantonly vile, horrible or inhuman within the purview of Code § 19.2-264.4C. Therefore, cases cited by Evans, such as James Dyral Briley v. Commonwealth, 221 Va. 563, 273 S.E.2d 57 (1980), Linwood Earl Briley v. Commonwealth, 221 Va. 532, 273 S.E.2d 48 (1980), Turner v. Commonwealth, 221 Va. 513, 273 S.E.2d 36 (1980), Giarratano v. Commonwealth, 220 Va. 1064, 266 S.E.2d 94 (1980), and Clark v. Commonwealth, 220 Va. 201, 257 S.E.2d 784 (1979), involving murders of exceptional atrociousness, are inapposite.

In Stamper v. Commonwealth, supra, the defendant was sentenced to death for each of three capital murders committed during an armed robbery. In two of the murders the jury's verdict fixing punishment at death was based entirely upon the defendant's proclivity for violence. His criminal record showed that he was sentenced in 1972 to serve twenty years in the penitentiary for a 1971 armed robbery and twelve months in jail for unauthorized use of an automobile, and was sentenced in 1974 to six months in jail as an accessory after the fact to an escape from the penal system. He was released on parole in 1976 and committed the triple murders in 1978. A victim of the 1971 armed robbery testified that he was shot by Stamper and permanently disabled during the commission of that crime. We upheld the imposition of the death sentence for each of the three capital murders.

In the present case, Evans had a criminal record extending back to his youth showing a consistent pattern of aggression, bellicosity, and violence. Although only the last conviction presented to the jury, that of September 27, 1972, for assault with a deadly weapon inflicting serious injuries, resulted in imposition of a substantial prison sentence, there were other convictions for offenses in which Evans used a deadly weapon. One of these offenses was assaulting a police officer

with a knife while the officer was in the performance of his duties. Another offense was escaping from the North Carolina prison system.

The jury could consider Evans's past criminal record together with the circumstances surrounding the commission of the Truesdale murder in determining whether he would probably commit other crimes of violence. Smith v. Commonwealth, supra, 219 Va. at 478 and n.4, 248 S.E.2d at 149. There was evidence that Evans came to Virginia with the single-minded purpose to escape, that he planned to kill, if necessary, any person who attempted to prevent his escape, and that, after fatally shooting Truesdale, he reaffirmed his intention to escape even if this meant that he would kill again or be killed. We hold that this evidence, which fitted into the pattern of violent conduct revealed by his past criminal record, was sufficient to support the jury's finding that he would be a continuing threat to society.

In its review of the case, the trial court, of course, had the benefit of a more extensive and detailed record of Evans's past criminal convictions not only in North Carolina but also in the District of Columbia, as well as his prison record and employment history. Thus, the trial court had additional information, not available to the jury, justifying the court's refusal to commute the punishment of death fixed by the jury to imprisonment for life.

We find no evidence that the jury verdict and the trial court's review thereof were influenced by passion, prejudice, or any other arbitrary factor. To the contrary, the record reflects careful, conscientious, and objective determinations made successively by jury and trial judge.

We have stated that if juries generally in this jurisdiction impose the death sentence for comparable crimes, then the sentence is not excessive or disproportionate even though a

codefendant or another accused may have received a lesser sentence. Coppola v. Commonwealth, 220 Va. 243, 259, 257 S.E.2d 797, 808 (1979), cert. denied, 444 U.S. 1103 (1980), applied in Stamper v. Commonwealth, supra, 220 Va. at 283, 257 S.E.2d at 824. In Martin v. Commonwealth, 221 Va. 436, 271 S.E.2d 123 (1980), the only other appeal presented to us in which a defendant was sentenced to death for murdering a police officer in violation of Code § 18.2-31(f), we reversed the conviction and remanded the case for a new trial because of error in selection of the jury. Therefore, we have no comparable cases to consider in determining whether the death sentence imposed upon Evans is excessive or disproportionate.

After carefully considering the record in this case, we hold that the sentence is not excessive or disproportionate. We have no hesitancy in concluding that juries generally in this jurisdiction will impose the death sentence for comparable crimes where inmates who kill prison guards have criminal records showing consistently turbulent, combative conduct and the probability of committing criminal acts of violence that will threaten the peace and security of the law-abiding public.[7] Accordingly, we will affirm the sentence of death.

Affirmed.

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[7] For more than a century prior to enactment of Code § 18.2-31(c) by Acts 1975, chs. 14 and 15, the death sentence was mandatory for an inmate who killed a prison guard. Acts 1843-44, c. 72, and successor statutes. Juries imposed the punishment required under these statutes, e.g., Ruffin v. Commonwealth, 62 Va. (21 Gratt.) 790 (1871); Brown v. Commonwealth, 132 Va. 606, 111 S.E. 112 (1922); Hart v. Virginia, 298 U.S. 34 (1936) (appeal denied by this Court, Supreme Court held there was no substantial federal question); Jefferson v. Commonwealth, 214 Va. 747, 204 S.E.2d 258 (1974); Washington v. Commonwealth, 216 Va. 185, 217 S.E.2d 815 (1975); Lewis v. Commonwealth, 218 Va. 31, 235 S.E.2d 320 (1977).

Until alternative punishment was added by Acts 1914, c. 240, the single sanction in Virginia for murder of the first degree was death. Juries imposed the death sentence both before and after the 1914 amendment for first degree murder of a police officer, e.g., Davis v. Commonwealth, 89 Va. 132, 15 S.E. 388 (1892); Gray v. Commonwealth, 150 Va. 571, 142 S.E. 397 (1928); Delp v. Commonwealth, 172 Va. 564, 200 S.E. 594 (1939).

§ 18.2-31. Capital murder defined; punishment. — The following offenses shall constitute capital murder, punishable as a Class 1 felony:

(a) The willful, deliberate and premeditated killing of any person in the commission of abduction, as defined in § 18.2-48, when such abduction was committed with the intent to extort money, or a pecuniary benefit;

(b) The willful, deliberate and premeditated killing of any person by another for hire;

(c) The willful, deliberate and premeditated killing of any person by an inmate in a penal institution as defined in § 53-19.18, or while in the custody of an employee thereof;

(d) The willful, deliberate and premeditated killing of any person in the commission of robbery while armed with a deadly weapon;

(e) The willful, deliberate and premeditated killing of a person during the commission of, or subsequent to, rape;

(f) The willful, deliberate and premeditated killing of a law-enforcement officer as defined in § 9-108.1 if when such killing is for the purpose of interfering with the performance of his official duties; and

(g) The willful, deliberate and premeditated killing of more than one person as a part of the same act or transaction.

If any one or more subsections, sentences or parts of this section shall be judged unconstitutional or invalid, such adjudication shall not affect, impair or invalidate the remaining provisions thereof but shall be confined in its operation to the specific provisions so held unconstitutional or invalid. (Code 1950, §§ 18.1-21, 53-291; 1960, c. 358; 1962, c. 42; 1966, c. 309; 1970, c. 648; 1973, c. 403; 1975, cc. 14, 15; 1976, c. 503; 1977, c. 478; 1979, c. 582; 1980, c. 221; 1981, c. 697.)

APPENDIX b

penalty may be imposed, a sentence of death shall not be imposed unless the court or jury shall (1) after consideration of the past criminal record of convictions of the defendant, find that there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing serious threat to society or that his conduct in committing the offense for which he stands charged was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind or an aggravated battery to the victim; and (2) recommend that the penalty of death be imposed. (1977, c. 492.)

§ **19.2-264.3. Procedure for trial by jury.** A. In any case in which the offense may be punishable by death which is tried before a jury the court shall first submit to the jury the issue of guilt or innocence of the defendant of the offense charged in the indictment, or any other offense supported by the evidence for which a lesser punishment is provided by law and the penalties therefor.

B. If the jury finds the defendant guilty of an offense for which the death penalty may not be imposed, it shall fix the punishment for such offense as provided by law.

C. If the jury finds the defendant guilty of an offense which may be punishable by death, then a separate proceeding before the same jury shall be held as soon as is practicable on the issue of the penalty, which shall be fixed as is provided in § 19.2-264.4. (1977, c. 492.)

§ **19.2-264.4. Sentence proceeding.** A. Upon a finding that the defendant is guilty of an offense which may be punishable by death, a proceeding shall be held which shall be limited to a determination as to whether the defendant shall be sentenced to death or life imprisonment. In case of trial by jury, where a sentence of death is not recommended, the defendant shall be sentenced to imprisonment for life.

B. In cases of trial by jury, evidence may be presented as to any matter which the court deems relevant to sentence, except that reports under the provisions of § 19.2-299, or under any Rule of Court, shall not be admitted into evidence. Evidence which may be admissible, subject to the rules of evidence governing admissibility, may include the circumstances surrounding the offense, the history and background of the defendant, and any other facts in mitigation of the offense. Facts in mitigation may include, but shall not be limited to, the following: (i) The defendant has no significant history of prior criminal activity, or (ii) the capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance or (iii) the victim was a participant in the defendant's conduct or consented to the act, or (iv) at the time of the commission of the capital felony, the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was significantly impaired, or (v) the age of the defendant at the time of the commission of the capital offense.

C. The penalty of death shall not be imposed unless the Commonwealth shall prove beyond a reasonable doubt that there is a probability based upon evidence of the prior history of the defendant or of the circumstances surrounding the commission of the offense of which he is accused that he would commit criminal acts of violence that would constitute a continuing serious threat to society, or that his conduct in committing the offense was outrageously or wantonly vile, horrible or inhuman, in that it involved torture, depravity of mind or aggravated battery to the victim.

D. The verdict of the jury shall be in writing and in one of the following forms:

(1) "We, the jury, on the issue joined, having found the defendant guilty of (here set out statutory language of the offense charged) and that after consideration of his prior history that there is a probability that he would commit criminal acts of violence that would constitute a continuing serious threat to society or his conduct in committing the offense is outrageously or wantonly vile, horrible or inhuman in that it involved (torture) depravity of mind (aggravated battery to the victim), and having considered the evidence in mitigation of the offense, unanimously fix his punishment at death.

Signed _____ foreman"

or

(2) "We, the jury, on the issue joined, having found the defendant guilty of (here set out statutory language of the offense charged) and having considered all of the evidence in aggravation and mitigation of such offense, fix his punishment at imprisonment for life.

Signed _____ foreman"

E. In the event the jury cannot agree as to the penalty, the court shall dismiss the jury, and impose a sentence of imprisonment for life. (1977, c. 492; 1980, c. 160.)

§ **19.2-264.5. Post sentence reports.** When the punishment of any person has been fixed at death, the court shall, before imposing sentence, direct a probation officer of the court to thoroughly investigate upon the history of the defendant and any and all other relevant facts, to the end that the court may be fully advised as to whether the sentence of death is appropriate and just. Reports shall be made, presented and filed as provided in § 19.2-299. After consideration of the report, and upon good cause shown, the court may set aside the sentence of death and impose a sentence of imprisonment for life. (1977, c. 492.)

APPENDIX C

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1981

WILBERT LEE EVANS

Petitioner

v

COMMONWEALTH OF VIRGINIA

Respondent

MOTION TO PROCEED IN FORMA PAUPERIS

COMES NOW, the Defendant, Wilbert Lee Evans and moves this court for entry of an Order granting him leave to proceed with this Petition for Writ of Certiorari in forma pauperis. As grounds for this Motion the Defendant does allege as follows:

1. That he is desirous of appealing the conviction from the Circuit Court of the City of Alexandria, Virginia.

2. That he is without funds to proceed at his own expense and is unable to afford the cost of such appeal.

3. He has attached the Affidavit hereto as required by this Court.

WHEREFORE, the premises considered, the Defendant, Wilbert Lee Evans moves this Court for leave to proceed on appeal in forma pauperis and for the assistance of court-appointed counsel.

WILBERT LEE EVANS

ING SWERSKY
NELAN & TEST
ORIA, VIRGINIA 22313

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1981

WILBERT LEE EVANS,	)	
	)	
Petitioner,	)	
	)	
v.	)	NO. _____
	)	
COMMONWEALTH OF VIRGINIA,	)	
	)	
Respondent.	)	

AFFIDAVIT IN SUPPORT OF MOTION TO PROCEED ON APPEAL IN FORMA PAUPERIS

I, WILBERT LEE EVANS, being first duly sworn, depose and say that I am the Petitioner in the above-entitled case; that in support of my motion to proceed on appeal without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor; that I believe I am entitled to redress; and that the issues which I desire to present on appeal are the following:

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of prosecuting the appeal are true.

1. Are you presently employed?

a. If the answer is yes, state the amount of your salary or wages per month and give the name and address of your employer.

b. If the answer is no, state the date of your last employment and the amount of the salary and wages per month which you received.

2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends, or other source?

NG SWERSKY
NELAN & TEST
ORIA VIRGINIA 22313

a. If the answer is yes, describe each source of income and state the amount received from each during the past twelve months.

3. Do you own any cash or checking or savings account?

a. If the answer is yes, state the total value of the items owned.

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)?

a. If the answer is yes, describe the property and state its approximate value.

5. List the persons who are dependent upon you for support and state your relationship to those persons.

I understand that a false statement or answer to any question in this Affidavit will subject me to the penalties of perjury.

_____
WILBERT LEE EVANS

STATE OF VIRGINIA,
CITY/COUNTY OF _____, to-wit:

SUBSCRIBED and SWORN TO before me this _____ day of _____, 1982.

_____
Notary Public

My commission expires: _____.

ING SWERSKY
NELAN & TEST
RGINIA 22313

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

No. 81-6131

WILBERT LEE EVANS,

Petitioner,

v.

COMMONWEALTH OF VIRGINIA,

Respondent.

Upon A Petition For Writ Of Certiorari To The Supreme Court Of Virginia

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BRIEF OF RESPONDENT IN OPPOSITION TO GRANTING OF WRIT OF CERTIORARI

Office of the Attorney General
Supreme Court Building
101 North Eighth Street
Sixth Floor
Richmond, Virginia 23219

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

No. 81-6131

WILBERT LEE EVANS,

Petitioner,

v.

COMMONWEALTH OF VIRGINIA,

Respondent.

Upon A Petition For Writ Of Certiorari To The Supreme Court Of Virginia

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BRIEF OF RESPONDENT IN OPPOSITION TO GRANTING OF WRIT OF CERTIORARI

PRELIMINARY STATEMENT

The respondent, Commonwealth of Virginia, respectfully prays that a Writ of Certiorari to the judgment of the Supreme Court of Virginia entered in this case on December 4, 1981, not be granted.

OPINION BELOW

The judgment of the Supreme Court of Virginia is a published Opinion reported as Evans v. Commonwealth, ____ Va. _____, 284 S.E.2d 816 (1981). A copy of the Opinion is attached to the Petition for a Writ of Certiorari as Appendix a.

JURISDICTION

Petitioner asserts that the jurisdiction of this Court to issue the writ of certiorari is grounded upon 28 U.S.C. § 1257(3).

QUESTIONS PRESENTED

1. Can petitioner's allegation that Virginia Code § 19.2-264.4 "impermissibly reduces the burden of proof" on the prosecution at sentencing be considered for the first time in this Court?

2. Is Virginia Code § 19.2-264.2 unconstitutional as being vague and overbroad?

3. Was admission of evidence that the petitioner was awaiting trial in another state, on charges for which he could receive life sentences, violative of due process, and is any constitutional issue in this regard properly before the Court?

4. Is certiorari review warranted in this case?

CONSTITUTIONAL AND STATUTORY PROVISIONS AND RULES INVOLVED

The relevant constitutional and statutory provisions are set forth in the Petition at pages 2 through 3 and in Appendix b and c to the Petition, except for the following Rules of this Court and of the Supreme Court of Virginia:

Rule 17.1 of the Rules of the Supreme Court of the United States provides in pertinent part that "[a] review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor...."

Rule 5:21 of the Rules of the Supreme Court of Virginia provides in pertinent part that "[e]rror will not be sustained [on appeal] to any ruling below unless the objection was stated with reasonable certainty at the time of the ruling, except for good cause shown or to enable [the] Court to attain the ends of

justice. Only errors assigned in the petition for appeal will be noticed by [the] Court and no error not so assigned will be admitted as a ground for reversal of a decision below...."

STATEMENT OF THE CASE

The petitioner, Wilbert Lee Evans, was convicted at a jury trial in the Circuit Court of the City of Alexandria, Virginia, of capital murder as defined by Virginia Code § 18.2-31(f), which is the willful, deliberate, and premeditated killing of a law-enforcement officer for the purpose of interfering with the performance of his official duties. In the second stage of the bifurcated trial, the same jury fixed Evans' punishment at death. After considering the probation officer's report, the trial court imposed the death sentence recommended by the jury.

At the trial the Commonwealth presented evidence that Evans, a prisoner, fatally shot Deputy Sheriff William Truesdale on January 27, 1981, while the officer was conducting him to jail in Alexandria. Evans admitted that he caused Truesdale's death with a firearm while the officer was engaged in the performance of his official duties. Evans consistently maintained, however, and so testified in his own defense, that he did not intend to kill Truesdale, and that the fatal shooting occurred accidentally while Evans was attempting to escape from police custody. (See April 16 tr. 500-502). Defense counsel indicated in his opening statement to the jury that the crucial question throughout the guilt trial would be Evans' intent. (April 16 tr. 277,279).

The uncontradicted evidence shows that Evans was in custody in North Carolina, that he volunteered to testify for the

Commonwealth in a habeas corpus proceeding to be held in Alexandria, and that he was transported from North Carolina to Alexandria for that purpose. Noel I. Butler, Assistant Commonwealth's Attorney, who interviewed Evans in the Alexandria jail on January 26, 1981, found him cooperative, willing to testify, and able to provide testimony of value on behalf of the Commonwealth. On the following day, however, when Evans was brought into the courtroom to testify, he refused to do so, denied any knowledge of the case, and by his behavior caused the court to recess the proceeding. (April 16 tr. 289-291).

Deputy Truesdale removed Evans and two other prisoners, Yvette Boone and Anthony Jasper, from the courthouse to jail in a van. Upon arriving outside the jail, the prisoners proceeded in single file up the steps leading to the jail door, Boone in front, followed by Jasper and then Evans. Jasper's right hand was handcuffed to Evans' left. As Jasper entered the door, Evans began to grapple with Truesdale on the steps. Evans, gaining possession of Truesdale's revolver, shot the officer in the chest from a distance of not more than one-half inch, pointed the weapon at Jasper but did not fire, freed himself by shooting open the handcuffs, and fled on foot. Running through a nearby law office, Evans threatened a secretary with the revolver before continuing his flight. Surrounded by pursuing officers in a nearby parking lot, Evans shot himself, inflicting a superficial wound, and was retaken into custody. (April 16 tr. 341-342, 360-367, 383, 401-407, 413-416, 424-426, 430-437).

Several inmates of the Alexandria jail were called as witnesses for the Commonwealth to testify to certain inculpatory statements made by Evans. Before these witnesses testified,

Evans objected to any reference they might make to charges pending against him in North Carolina on which he had not been convicted. (April 16 tr. 297-299). The court overruled the objection on the ground that such evidence would be admissible to show Evans' intent or state of mind. (April 16 tr. 299-300).

Ralph Washington, an inmate, testified that Evans told him the night before the shooting that he was in Alexandria to testify in a case but that he was not going to say anything, that what he wanted was to "get the hell out." Evans asked Washington about jail security, what court was like, whether the guards carried guns, and whether he could wear civilian clothes to court. He asked another inmate about a good place to run if he escaped. Washington testified that Evans stayed up all night and "was like he was getting ready to go to war." Washington's testimony continued as follows:

> "A. He said he'd already come down; he was already facing life and he ain't got nothing to lose. He said he was going to try any means possible to escape.
>
> "Q. To what steps would he go?
>
> "A. Anybody that gets in his way to stop him, he would take him out.
>
> "Q. Take him out? What does that mean?
>
> "A. I guess kill them."
> (April 16 tr. 301-306).

At this time the court cautioned the jury as follows:

> "Members of the jury, the statements of the defendant are being admitted into evidence not to show his legal situation in the State of North Carolina, but rather to show his state of mind or intention at the time he made the statements. You should consider those statements only in that respect."
> (April 16 tr. 306).

Yvette Boone testified that she was brought from jail in North Carolina to the Alexandria jail to testify as a witness

in the same case in which Evans was expected to testify. While they were still in jail in North Carolina, Evans attempted to coach her in preparation for her appearance in court. He also informed Boone that when he went to court he was going "to run." In Alexandria, before Boone testified at the hearing, Evans told her that he had come not to testify but to escape. She, Jasper, and Evans were the prisoners being taken back to jail when Deputy Truesdale was shot. She saw Truesdale and Evans "tussling on the steps," but she was inside the jail door when she heard the shots fired. (April 16 tr. 335-349).

Anthony Jasper testified that he occupied the same cell with Evans the night before the shooting, and Evans said that he had come to Alexandria "to try to escape." He asked Jasper the way to run to get to Washington, D.C. "He said he ain't got nothing to lose, you know.... He had two life sentences, something like that." (April 16 tr. 355-356). The trial court promptly cautioned the jury that these statements were admitted only to show Evans' state of mind when he made the statements and not to prove whether he was facing punishment in North Carolina. (April 16 tr. 356).

Jasper also testified that he and Evans were handcuffed together on the trip back to jail from the courthouse. Evans asked him whether Truesdale carried a weapon. Jasper had climbed the steps and was entering the jail door when Evans "yanked" him back. He saw Evans and Truesdale struggling over the handgun in Evans' hand. Evans had the gun in the air when Truesdale put his hand on it. Evans said, "Let me go or I'll kill your ass." Then the revolver "came down toward his side and he pulled the trigger." Evans then put the gun to Jasper's head, Jasper protested, and Evans shot the handcuffs off and fled. (April 16 tr. 358, 360-363).

Evans, testifying in his own defense, insisted that he had no intent to escape until he saw that Deputy Truesdale was off balance on the jail steps and decided to "run past him." He seized Truesdale's gun to "shoot the handcuffs off." He denied any intention of shooting the officer but asserted that he shot him accidentally while firing at the handcuffs. (April 16 tr. 487, 498-502).

On appeal to the Virginia Supreme Court Evans conceded that evidence was admissible to show that he planned in North Carolina to escape in Virginia and that, if necessary, he would kill anyone who stood in his way. (See App. a at 6). He argued, however, that the trial court erred in admitting evidence that he was awaiting trial in North Carolina on charges for which he faced one or more life sentences. He relied upon the general rule recently restated in Moore v. Commonwealth, 222 Va. 72, 76, 278 S.E.2d 822, 824 (1981), that evidence of other offenses is inadmissible to prove guilt of the crime for which the accused is on trial. The Virginia Supreme Court pointed out, however, that this general rule, as that Court has frequently stated, is subject to numerous exceptions, and that evidence of other offenses is admissible to show motive or intent or to negate the possibility of accident. (See Appendix a at 6).

At the sentence proceeding which immediately followed the determination of guilt, the Commonwealth presented the testimony of one witness, Officer Louis Pough, of the Alexandria Police Department. Pough testified that he had a conversation with Evans after the Truesdale shooting, and Evans was "concerned about returning to North Carolina on other charges." Evans told Pough that "it mattered not to him who was in his way,"

that he was from the District of Columbia and he "would try to escape again or be killed at home." (April 17 tr. 586). Counsel for Evans objected to Pough's testimony about North Carolina charges and moved for a mistrial. The court overruled the motion but cautioned the jury to disregard the reference to "other charges" pending in North Carolina. (April 17 tr. 586-587).

The other evidence presented at this proceeding consisted of Commonwealth Exhibits 19,20, and 21, showing several of Evans' convictions in North Carolina and the sentences imposed thereon as follows:

February 21, 1964	- Breaking, entering and larceny	- 6 months
July 30, 1964	- Assaulting a police officer with a knife while the officer was in the performance of his duties	- 6 months on road
July 30, 1964	- Engaging in an affray with a knife	- 6 months on road to run consecutively with other sentence of same date
September 30, 1964	- Engaging in an affray with a deadly weapon	- 4 months
December 15, 1970	- Assault & Battery & Assault Inflicting Serious Damage (hitting man in face with his fist, breaking his nose and knocking one tooth out)	- 60 days
July 12, 1972	- Escape from North Carolina Prison System	- 3 months

September 27, 1972	- Assault with a deadly weapon inflicting serious injuries	- not less than four years nor more than five years

Included in the jury instructions, all of which were unchallenged on appeal (See Appendix a at 9), was Instruction No. 14 stating in the alternative what the Commonwealth had to prove before the jury could fix Evans' punishment at death. After retiring to consider its verdict, the jury propounded two questions to the court; first, whether Evans' "past criminal record," to which Instruction No. 14 referred, included all the evidence "offered before and after the verdict," and second, whether Officer Pough's testimony could be considered as part of Evans' record. The court answered both questions in the negative and further instructed the jury that the only evidence of Evans' past criminal record which it could consider was contained in Exhibits 19,20, and 21. (April 17 tr. 610-611). Subsequently, the jury returned its verdict finding "after consideration of his prior history that there is a probability that he would commit criminal acts of violence that would constitute a continuing serious threat to society," and fixing Evans' punishment at death.

Evans contended on appeal below that the trial court erred in overruling his motion for a mistrial made when Officer Pough referred to other charges pending against Evans in North Carolina. In rejecting this argument, the Virginia Supreme Court pointed out that the jury was aware that Evans faced charges in North Carolina because of references thereto properly admitted in the guilt trial to show his motive or intent. The trial court, however, expressly directed the jury to disregard the

reference to North Carolina charges in considering the appropriate punishment to be imposed upon Evans. The court further instructed the jury, in answer to its questions, that Evans' past criminal record was limited to convictions shown in Exhibits 19,20, and 21 and did not include anything revealed by Officer Pough's testimony. Furthermore, the Virginia Court perceived no prejudice to Evans resulting from Pough's testimony, but opined that if there was any prejudice, it was eliminated by the trial court's decisive corrective action. (See Appendix a at 10).

After the jury recommended the death sentence, the trial judge in his review of that sentence considered the report of a probation officer. That report, as the Virginia Supreme Court noted, was damaging rather than helpful to Evans. It showed that he had a criminal record more extensive than that introduced into evidence in Exhibits 19,20, and 21, an unsatisfactory prison record, and an employment history which included acts of violence.

In 1968, a District of Columbia court sentenced Evans to serve a total of 720 days for assault and petit larceny. During his incarceration he received four disciplinary reports, including one for fighting. One former employer in the District of Columbia reported that in 1979 he refused to rehire Evans after Evans had "choked" a waitress during an argument. Several other former employers gave unfavorable reports about his work habits and behavior, but two reported that he was a good worker. His prison records in North Carolina revealed that seven disciplinary reports, one for unauthorized possession of a weapon, were filed against him from February 10, 1973, through September 28, 1975. Other convictions in North Carolina not listed in

Exhibits 19,20, and 21 included one in 1962 for assault with a deadly weapon, with a six months sentence suspended, one in 1965 for assault and battery, disorderly conduct, resisting arrest, and breaking arrest, with a six months sentence, and one in 1967 for assault and battery, with a thirty days sentence.

By order entered June 1, 1981, the trial court sentenced Evans to death in accordance with a jury verdict.

On appeal Evans contended, as he had in a pretrial motion (March 19 tr. 2-3), that Virginia Code § 19.2-264.4C was unconstitutionally vague and overbroad in violation of the Eighth and Fourteenth Amendments. The Virginia Supreme Court observed that Evans "relies entirely, however, upon arguments that, as he concedes, [the Virginia Supreme Court] recently rejected in James Dyral Briley v. Commonwealth, 221 Va. 563, 577-80, 273 S.E.2d 57, 65-67 (1980)." (See Appendix a at 2). The Court reaffirmed its Briley Opinion and further cited Martin v. Commonwealth, 221 Va. 436, 439-40, 271 S.E.2d 123, 125-26 (1980). (Appendix a at 2).

Evans also argued on his appeal below that Virginia Code § 19.2-264.2 is facially unconstitutional, and he adopted the arguments that, as he further conceded, the Virginia Supreme Court had already rejected in Smith v. Commonwealth, 219 Va. 455, 248 S.E.2d 135 (1978), cert. denied, 444 U.S. 967 (1979), and Waye v. Commonwealth, 219 Va. 683, 251 S.E.2d 202 (1978), cert. denied, 442 U.S. 924 (1979). After also citing its previous decision in Stamper v. Commonwealth, 220 Va. 260, 267, 257 S.E.2d 808, 814 (1979), cert. denied, 445 U.S. 972 (1980), the Virginia Supreme Court reaffirmed its views expressed in those cases. (Appendix a at 2-3).

After affirmance of Evans' conviction and sentence by the Supreme Court of Virginia on December 4, 1981, no petition for rehearing was filed in that Court.

ARGUMENTS AGAINST GRANTING CERTIORARI

I.

PETITIONER'S ALLEGATION THAT APPLICATION OF § 19.2-264.4 OF THE VIRGINIA CODE "IMPERMISSIBLY REDUCES THE BURDEN OF PROOF ON THE GOVERNMENT" AT SENTENCING IS NOT PROPERLY BEFORE THIS COURT AND THUS CANNOT BE CONSIDERED.

Evans argues in his petition that § 19.2-264.4 of the Virginia Code impermissibly reduces the burden of proof on the government at sentencing, because it requires only that the Commonwealth prove beyond a reasonable doubt that there is "a probability" the defendant in the future would commit criminal acts of violence that would constitute a continuing serious threat to society. (Petition at 9). This issue is clearly not before this Court, because it was not before the Supreme Court of Virginia below.[1]

It has long been established that the Supreme Court of the United States is vested with no jurisdiction unless the federal question asserted was raised and decided in the state court below. Crowell v. Randell, 10 Peters 368, 392 (1836); Godchaux Co. v. Estopinal, 251 U.S. 179 (1919); Jett Brothers Distilling Co. v. Carrollton, 252 U.S. 1, 4-6 (1920); Phillips v. United States, 312 U.S. 246, 252-253 (1941); Beck v. Washington, 369 U.S. 541, 549-550 (1962); Cardinale v. Louisiana, 394 U.S.437 (1969) While an appeal may lie even though the state court is

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[1] Indeed, not only was the issue not raised on appeal, but it was not asserted at trial or assigned as error. Virginia procedure requires that constitutional challenges to state statutes be made in the trial court. Rice v. Commonwealth, 212 Va. 778, 188 S.E.2d 196 (1972); King v. Commonwealth, 219 Va. 171, 247 S.E.2d 368 (1978). See Smith v. Commonwealth, 219 Va. 455, 460 n. 1, 248 S.E.2d 135, 139 n. 1 (1978). Rule 5:21 of the Rules of the Supreme Court of Virginia requires that issues be raised with reasonable certainty at trial. That Rule also states that "[o]nly errors assigned... [for appeal] will be noticed" on appeal.

not explicit in rejecting a timely challenge to the validity of a state statute on federal grounds, the challenge itself must be explicit. See Largent v. Texas, 318 U.S. 418 (1943).

In a federal system it is important that state courts be given the first opportunity to consider the validity of state statutes in light of constitutional challenge because statutes may be construed in a way that saves their constitutionality, or the issue may be resolved by the state court with an adequate state ground for denial of relief. Cardinale v. Louisiana, supra at 439. The Supreme Court of Virginia was not afforded this opportunity as to petitioner's "burden of proof" claim. The issue simply was not presented to that Court.

In the Virginia Supreme Court below, petitioner Evans challenged § 19.2-264.4C as being unconstitutionally broad and vague in its application to his case. His total assertion in that regard was as follows:

> In the interest of brevity of pleading, the defendant in support of his argument that Title 19.2, Section 264.4(c) Code of Virginia (1950), as amended is in violation of the Eighth and Fourteenth Amendments of the United States Constitution would rely on those arguments set forth in Briley v. Commonwealth, 221 Va. 563 (1980) at pp. 577 through 580 inclusive [273 S.E.2d 57, 65-68], and the cases referred to therein. The defendant is aware that the Court has ruled against the same argument. (Brief of Appellant below at 4).

The Virginia Supreme Court in its Opinion below addressed the issue as follows:

> Evans contends that Code § 19.2-264.4C is unconstitutionally vague and overbroad in violation of his rights under the Eighth and Fourteenth Amendments to the United States Constitution. He relies entirely, however, upon arguments that, as he concedes, we have recently rejected in James Dyral Briley v. Commonwealth, 221 Va. 563, 577-80, 273

> S.E.2d 57, 65-67 (1980). We reaffirm our views expressed in that case. See also Martin v. Commonwealth, 221 Va. 436, 439-40, 271 S.E.2d 123, 125-26 (1980).
> (Appendix a at 2).

In Briley there was no assertion of petitioner's "burden of proof" argument concerning probability of dangerousness, and the Virginia Supreme Court did not consider and decide that issue in the case at bar.

II.

SECTION 19.2-264.2 OF THE VIRGINIA CODE IS NOT UNCONSTITUTIONALLY VAGUE AND OVERBROAD IN ITS APPLICATION TO THE PRESENT CASE AS TO VIOLATE THE EIGHTH AND FOURTEENTH AMENDMENTS.

In the Virginia Supreme Court petitioner challenged § 19.2-264.2 of the Virginia Code as being "facially unconstitutional." He adopted without elaboration, and relied entirely on, the arguments rejected by the Virginia Court in Smith v. Commonwealth, 219 Va. 455, 248 S.E.2d 135 (1978), cert. denied, 441 U.S. 967 (1979), and Waye v. Commonwealth, 219 Va. 683, 699-700, 251 S.E.2d 202, 211 (1978), cert. denied, 442 U.S. 924 (1979).

The Supreme Court of Virginia addressed his contention in the following manner:

> Evans also argues that Code § 19.2-264.2 is facially unconstitutional. He adopts the arguments that, as he further concedes, we rejected in Smith v. Commonwealth, [supra] and Waye v. Commonwealth, [supra]. See Stamper v. Commonwealth, 220 Va. 260, 267, 257 S.E.2d 808, 814 (1979), cert. denied, 445 U.S. 972 (1980). We reaffirm our views expressed in these cases.

In Smith[2] the appellant contended that the statutory

[2] Waye v. Commonwealth, supra at 699-700; 211, the Virginia Supreme Court essentially reaffirmed what it said in Smith.

definition of the "aggravating circumstance" referred to as the "potential dangerousness" of the defendant was so vague as to vest the sentencing authority with standardless sentencing power. This "aggravating circumstance" provides that the death penalty may not be imposed unless the court or jury shall, after consideration of the past criminal record of convictions of the defendant, find that there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing serious threat to society. As the Virginia Supreme Court noted in Smith, this aggravating circumstance is identical to that in the Texas statute upheld in Jurek v. Texas, 428 U.S. 262 (1976). Rejecting a vagueness challenge to that language, this Court in Jurek said:

> It is, of course, not easy to predict future behavior. The fact that such a determination is difficult, however, does not mean that it cannot be made. Indeed, prediction of future criminal conduct is an essential element in many of the decisions rendered throughout our criminal justice system. The decision whether to admit a defendant to bail, for instance, must often turn on a judge's prediction of the defendant's future conduct. And any sentencing authority must predict a convicted person's probable future conduct when it engages in the process of determining what punishment to impose. For those sentenced to prison, these same predictions must be made by parole authorities. The task that a Texas jury must perform in answering the statutory question in issue is thus basically no different from the task performed countless times each day throughout the American system of criminal justice. What is essential is that the jury have before it all possible relevant information about the individual defendant whose fate it must determine. (428 U.S. at 274-76).

The Virginia Supreme Court has construed the phrase "criminal acts of violence" to mean serious and intentional acts of unprovoked violence committed against the person and the term "probability" to mean a likelihood substantially greater than a mere possibility that the defendant would commit

similar crimes in the future. Smith v. Commonwealth, supra at 478; 149.

Petitioner attempts to distinguish Jurek. He argues that the Texas statute involved in that case required a finding of (1) whether the conduct of the defendant which caused the death of the victim was committed deliberately and with the reasonable expectation that death would result; (2) whether there is a probability that the defendant would commit criminal acts of violence that would be a continuing threat to society; and (3) if raised by the evidence, whether the conduct of the defendant in killing the victim was unreasonable in response to the provocation, if any. (Petition at 7-8).

The respondent submits that petitioner's attempted distinguishing of Jurek is hollow. Consideration number 3 would be patently inapplicable to a situation like the case at bar. Item number 2 is substantially the same as what the jury found in this case and Virginia law requires. Item number 3 is likewise not significant. Virginia law requires that to be convicted and sentenced for capital murder of a law-enforcement officer - as the petitioner was in this case - the jury must find a "willful, deliberate and premeditated killing" of that officer for the purpose of interfering with the performance of his official duties. Section 18.2-31(f), Code of Virginia (1950), as amended. (See Appendix b).

When examining the vagueness issue in connection with the Texas aggravating circumstances Mr. Justice White concurring in Jurek noted "that the issues posed in the sentencing proceeding have a common-sense core of meaning and that criminal jurors should be capable of understanding them." 428 U.S. at 279.

Vagueness challenges to statutes that do not involve First

Amendment freedoms must be examined in the light of the facts of the case at hand.[3] United States v. Mazurie, 419 U.S. 544 (1974). The facts in this case show that petitioner Evans had "a criminal record extending back to his youth showing a consistent pattern of aggression, bellicosity, and violence." (Appendix a at 14). As the Virginia Court below noted, although only the last conviction presented to the jury, that of September 27, 1972, for assault with a deadly weapon inflicting serious injuries, resulted in a substantial prison sentence, there were other convictions for offenses in which Evans used a deadly weapon. One such offense was assaulting a police officer with a knife while that officer was in the performance of his duties. Another offense was for escape from the North Carolina prison system.

The jury could consider Evans' past criminal record together with the circumstances of the murder of Deputy Sheriff Truesdale in determining whether he would probably commit other crimes of violence. Indeed, there was evidence

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[3] The due process protection against excessive vagueness "does not invalidate every statute which a reviewing court believes could have been drafted with greater precision." Rose v. Locke, 423 U.S. 48, 49 (1975) (Upheld phrase "crimes against nature"). Furthermore, "[m]any statutes will have some inherent vagueness, for '[i]n most English words and phrases there lurk uncertainties.'" Id. at 49-50. In applying the vagueness doctrine to state statutes and city ordinances under the due process requirement of the Fourteenth Amendment, the United States Supreme Court has stated that the doctrine is based on the principle that no person "shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed." Colten v. Kentucky, 407 U.S. 104,110 (1972), quoting United States v. Harris, 347 U.S. 612, 617 (1954). "The root of the vagueness doctrine is a rough idea of fairness. It is not a principle designed to convert into a constitutional dilemma the practical difficulties in drawing criminal statutes both general enough to take into account a variety of human conduct and sufficiently specific to provide fair warning that certain kinds of conduct are prohibited." Colten v. Kentucky, supra at 110. That is, "[a]ll the Due Process Clause requires is that the law give sufficient warning that men may conduct themselves so as to avoid that which is forbidden." Rose v. Locke, supra at 50.

that Evans came to Virginia with the sole purpose of escaping, and that he planned to kill, if necessary, anyone who attempted to prevent his escape. Further, after killing Truesdale, Evans reaffirmed his intention to escape even if it meant that he would kill again or be killed.

Section 19.2-264.2 of the Virginia Code is not unconstitutionally vague and broad in its application to this case.

III.

ADMISSION OF EVIDENCE THAT THE PETITIONER WAS AWAITING TRIAL IN ANOTHER STATE WAS NOT VIOLATIVE OF DUE PROCESS, AND NO CONSTITUTIONAL ISSUE IS PROPERLY BEFORE THE COURT.

In his assignments of error from his trial, Evans set forth the following assignment on the admissibility of the challenged evidence:

> The trial court erred in permitting evidence to be admitted to the jury of alleged crimes or pending charges involving the Appellant under the theory that it tended to show "state of mind" to commit the crime he was then being tried for by the jury.

There was no constitutionally-based objection at trial to the admission of the evidence, and the Virginia Supreme Court decided no constitutional question as to the admission of this evidence. (See Appendix a at 6-7).[4] Under Virginia procedure, constitutionally-based objections must be made at trial and

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[4] Petitioner did not file for rehearing claiming that the Virginia Supreme Court had misunderstood or failed to address his position.

assigned as error for appeal. Rice v. Commonwealth, 212 Va. 778, 188 S.E.2d 196 (1972); King v. Commonwealth, 219 Va. 171, 247 S.E.2d 368 (1978); Waye v. Commonwealth, supra at 690 n. 1; 207 n. 1; Rule 5:21, Rules of the Supreme Court of Virginia. Accordingly, no federal question is presented for review by this Court. See generally Beck v. Washington, 369 U.S. 541, 549-554 (1962).

Even assuming, arguendo, that petitioner's due process claim could be considered, it is without merit. This Court has held that the Fourteenth Amendment leaves the states free to adopt a rule of relevance based on the widely recognized principle that evidence of other crimes may be shown to establish intent, design and system. See Lisenba v. California, 314 U.S. 219, 227-228 (1941). See also Williams v. Wolff, 517 F. Supp. 925, 929 (D. Nev. 1981).

In the instant case Evans conceded in the Virginia Supreme Court below that evidence was admissible to show that he planned in North Carolina to escape in Virginia and, if necessary, to kill anyone who stood in his way. (Appendix a at 6). He contended, however, that the trial judge erred in admitting evidence that he was awaiting trial in North Carolina on charges for which he faced one or more life sentences. (Appendix a at 6.

As to the guilt phase of the trial the Supreme Court of Virginia held that:

> Here, the trial court exercised commendable caution in twice instructing the jury during the guilt trial that the statements made by Evans in reference to charges pending against him in North Carolina were admitted into evidence solely for the purpose of showing his intent or state of mind. We hold that the statements were properly admitted for that purpose. The jury could reasonably infer that a prisoner held on charges for which he might

> be sentenced, upon conviction, to imprisonment for life would have a far more compelling motive for attempting to escape by force and violence than one held on charges for which he could receive only a lesser punishment.
> (Appendix a at 7).

In regard to the sentencing phase, Evans contended below that the trial judge erred in overruling his motion for a mistrial made when Officer Pough at the sentence hearing referred to other charges pending against Evans in North Carolina.

In finding no merit to this contention, the Virginia Court below held:

> The jury was aware that Evans faced charges in North Carolina because of references thereto properly admitted in the guilt trial to show his motive or intent. The trial court, however, expressly directed the jury to disregard the reference to North Carolina charges in considering the appropriate punishment to be imposed upon Evans. The court further instructed the jury, in answer to its questions, that Evans' past criminal record was limited to convictions shown in Exhibit 19,20, and 21 and did not include anything revealed by Officer Pough's testimony.
>
> We perceive no prejudice to Evans resulting from Pough's testimony, but if there was any prejudice, it was eliminated by the trial court's decisive corrective action.
> (Appendix a at 10).

Surely this is a matter of state law under the Lisenba principle and not one of constitutional magnitude.

IV.

THIS CASE DOES NOT MERIT REVIEW BY THIS COURT.

A Writ of Certiorari is not a matter of right, but of judicial discretion, and will be "granted only when there are special and important reasons therefor." Rule 17.1 of the Rules of the Supreme Court of the United States. The only

constitutional issues properly before the Court are ones which were previously submitted to the Court on petitions for certiorari in other capital cases in which such writs were denied. See Smith v. Commonwealth, 219 Va. 455, 248 S.E.2d 135 (1978), cert. denied, 444 U.S. 967 (1979); Waye v. Commonwealth, 219 Va. 683, 251 S.E.2d 202 (1978), cert. denied, 442 U.S. 924 (1979); Stamper v. Commonwealth, 220 Va. 260, 267, 257 S.E.2d 808, 814 (1979), cert. denied, 445 U.S. 972 (1980).

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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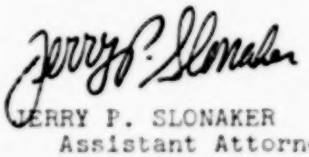

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